

² The Board notes that, following the September 20, 2019 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 15, 2005 appellant, then a 36-year-old park ranger (protection), filed a traumatic injury claim (Form CA-1) alleging that on August 8, 2015 he sustained multiple injuries to both legs and his left arm when his employment vehicle hydroplaned and struck another vehicle, while in the performance of duty. OWCP accepted the claim for left arm fracture, contusions to both legs and left upper arm, left hip dislocation, bilateral femur fracture, and left tibial fracture.

OWCP paid appellant wage-loss compensation on the supplemental rolls beginning September 24, 2005. On April 29, 2007 appellant returned to work eight hours per day, three days per week. Thereafter, OWCP paid him wage-loss compensation on the periodic rolls beginning March 9, 2014.³

On September 11, 2014 appellant underwent a functional capacity evaluation (FCE) which found that he was disabled from performing his date-of-injury job, but was capable of performing a light physical demand job. On September 29 and November 5, 2014 Dr. Thomas Large, a Board-certified orthopedic surgeon, reviewed and agreed with the findings of the September 11, 2014 FCE regarding appellant's work capacity.

On March 1, 2016 OWCP proposed to reduce appellant's compensation benefits as he was no longer totally disabled and had the capacity to earn wages in the constructed position of information clerk at the weekly pay rate of \$378.00. It relied on Dr. Large's November 5, 2014 report and the September 11, 2014 FCE to find that appellant was capable of working 40 hours per week. OWCP provided appellant 30 days to respond. No response was received.

On May 23, 2016 OWCP issued a loss of wage-earning capacity (LWEC) determination reducing appellant's wage-loss compensation, effective May 29, 2016, based on his capacity to earn wages as an information clerk, *Dictionary of Occupational Titles (DOT)* # 237.637.022, 40 hours per week. It based his work restrictions on those set forth in the September 11, 2014 FCE and the November 5, 2014 report by Dr. Large.

On February 28, 2017 appellant requested reconsideration. He asserted that his condition had worsened and that he was only able to work 20 hours a week due to prescribed narcotic pain medication. Appellant submitted an August 19, 2016 physical capacity evaluation by Dr. James C. Karegeannes, a Board-certified orthopedic surgeon. Dr. Karegeannes opined that appellant was capable of working four hours a day five days per week with restrictions. Work restrictions included occasional lifting of up to 20 pounds, sitting, standing, and walking for up to 30 minutes for up to 3 hours per day.

³ By decision dated September 14, 2009, OWCP granted appellant a schedule award for 67 percent permanent impairment of the left leg. The period of the award ran from March 21, 2008 through November 16, 2011.

By decision dated May 25, 2017, OWCP denied modification of its May 23, 2016 LWEC determination.

On May 18, 2018 appellant requested reconsideration, asserting that he was only capable of working four hours a day, five days per week. In support of his request, he submitted a May 9, 2018 note from Dr. Karegeannes advising that he was limited to a 20-hour work week due to pain, which developed from standing for short periods of time and in positions requiring stooping or bending.

By decision dated August 10, 2018, OWCP denied modification of its May 23, 2016 LWEC determination.

Dr. Karegeannes, in a September 28, 2018 report, provided examination findings, diagnosed left knee joint ankylosis complaints, and noted no real change in his functional capacity.

On August 9, 2019 appellant requested reconsideration, asserting that his use of opioids impacted his ability to work, and that he was, therefore, not able to work 40 hours a week. He also alleged that his condition had worsened and he submitted an x-ray interpretation and computer tomography (CT) scan of his cervical spine.

A September 27, 2018 cervical x-ray interpretation revealed degenerative disc disease, normal alignment, C6-7 moderate disc space narrowing, C5-6 mild space narrowing and end plate sclerosis and spurring, and minimal facet arthropathy.

A January 3, 2019 cervical spine CT scan revealed degenerative disc disease, no fracture moderate C6-7 disc space narrowing, mild C3-4 and C5-6 disc space narrowing, mild endplate sclerosis, minimal facet arthropathy, C2-3, C5-6, and C6-7 minimal spinal canal stenosis, and C5-6 and C6-7 mild right foraminal stenosis.

By decision dated September 20, 2019, OWCP denied appellant's request for reconsideration.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. It may review an award for or against payment of compensation at any time based on its own motion or on application.⁴

A claimant seeking reconsideration of a final decision must present arguments or provide evidence which: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁵ If OWCP determines

⁴ *Supra* note 1.

⁵ 20 C.F.R. § 10.606(b)(3); *see also* *L.C.*, Docket No. 19-0503 (issued February 7, 2020); *M.S.*, Docket No. 18-1041 (issued October 25, 2018); *C.N.*, Docket No. 08-1569 (issued December 9, 2008).

that at least one of these requirements is met, it reopens and reviews the case on its merits.⁶ If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁷

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

As a general rule, if a formal LWEC determination has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner should evaluate the request according to the customary criteria for modifying a formal LWEC.⁸ Nonetheless, in cases where arguments submitted have previously been addressed by OWCP and in which a claimant submits no new or relevant evidence, OWCP may address the request under the provisions found in section 8128 of FECA and may deny merit review.⁹

In his request for reconsideration, appellant maintained that his condition had worsened, that he was unable to work 40 hours a week, and that his use of opioids impacted his ability to work. OWCP, however, previously addressed these contentions. The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already of record does not constitute a basis for reopening a case.¹⁰ Consequently, appellant was not entitled to a review of the merits based on the first or second above-noted requirements.¹¹

The Board further finds that appellant failed to submit relevant and pertinent new evidence in support of his August 9, 2019 request for reconsideration. The underlying issue on reconsideration was whether appellant had met his burden of proof to establish that the May 23, 2016 LWEC determination should be modified. Appellant submitted a September 28, 2018 report from Dr. Karegeannes diagnosing left knee joint ankylosis complaints and no real change in appellant's functional capability. This report does not directly address appellant's work capacity as it merely notes that his functional capability is unchanged. While this evidence is new, it is substantially similar to the prior evidence of record. Providing additional evidence that either repeats or duplicates information already in the record does not constitute a basis for reopening a

⁶ *Id.* at § 10.608(a); *see also* C.K., Docket No. 18-1019 (issued October 24, 2018).

⁷ *Id.* at § 10.608(b); A.G., Docket No 19-0113 (issued July 12, 2019); K.H., 59 ECAB 495 (2008).

⁸ L.C., *supra* note 5; H.W., Docket No. 18-1175 (issued December 6, 2018); Katherine T. Kreger, 55 ECAB 633 (2004).

⁹ L.C., *id.*; L.W., Docket No. 16-1202 (issued January 25, 2018).

¹⁰ I.M., Docket No. 20-0980 (issued February 2, 2021); N.L., Docket No. 18-1575 (issued April 3, 2019); Eugene F. Butler, 36 ECAB 393, 398 (1984).

¹¹ 20 C.F.R. § 10.606(b)(3); *see* R.L., Docket No. 19-1051 (issued December 2, 2020); J.W., Docket No. 19-1795 (issued March 13, 2020).

claim.¹² Therefore, this report insufficient to require OWCP to reopen the claim for consideration of the merits.

Appellant also submitted diagnostic studies dated September 27, 2018 and January 3, 2019. These studies are also insufficient to warrant merit review as diagnostic studies, standing alone, lack probative value and are insufficient to establish that the LWEC determination should be modified.¹³ The Board has held that the submission of evidence that does not address the particular issue involved does not constitute a basis for reopening a case.¹⁴ Because appellant has not provided relevant and pertinent new evidence, he was not entitled to a review of the merits based on the third requirement under 20 C.F.R. § 10.606(b)(3).¹⁵

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

Appellant may request modification of the LWEC determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹² *G.J.*, Docket No. 19-1652 (issued January 29, 2021); *C.L.*, Docket No. 20-0410 (issued October 29, 2020); *S.F.*, Docket No. 18-0516 (issued February 21, 2020); *James W. Scott*, 55 ECAB 606 (2004).

¹³ *G.J.*, *id.*; *J.K.*, Docket No. 20-0591 (issued August 12, 2020); *J.P.*, Docket No. 19-0216 (issued December 13, 2019); *A.B.*, Docket No. 17-0301 (issued May 19, 2017).

¹⁴ *J.K.*, *id.*; *G.Q.*, Docket No. 18-1697 (issued March 21, 2019); *Alan G. Williams*, 52 ECAB 180 (2000).

¹⁵ *J.K.*, *id.*

ORDER

IT IS HEREBY ORDERED THAT September 20, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 12, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board